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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/859,716	05/17/2001	Raymond S. Wach	EMPO4-27	4114

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EXAMINER

TAYLOR, NICHOLAS R

ART UNIT PAPER NUMBER

2141

DATE MAILED: 02/22/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b> 09/859,716	<b>Applicant(s)</b> WACH, RAYMOND S.	
	<b>Examiner</b> Nicholas R. Taylor	<b>Art Unit</b> 2141	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 23 January 2006.
- 2a) ☒ This action is **FINAL**.                      2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1,4-7,11-15,19,22-25,29,32-35,37 and 38 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1,4-7,11-15,19,22-25,29,32-35,37 and 38 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☒ The drawing(s) filed on 17 May 2001 is/are: a) ☒ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                                   | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152)             |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

### **DETAILED ACTION**

1. Claims 1, 4-7, 11-15, 19, 22-25, 29, 32-35, 37, and 38 have been presented for examination and are rejected.

### ***Response to Arguments***

2. Applicant's arguments filed January 23<sup>rd</sup>, 2006 have been fully considered but they are deemed not persuasive.

3. In the remarks, applicant argued in substance that:

(A) Prior art of Hubbard and Sharon fails to teach targeting an object-oriented software component such as an enterprise java bean, as Hubbard teaches providing client systems with a workload task to index a portion of the information accessible on the network.

As to point (A), Hubbard teaches "operational code (i.e., an agent) residing and installed on the client system" (Hubbard, column 7, lines 7-10; see also lines 10-29 and figure 2C). This code is an object-oriented software component that is "targeted" in the scheduled load test outlined in the originally cited column 15, lines 27-59. In response to the implied argument that an example of an object-oriented software component would specifically be limited to an Enterprise JavaBean, this feature is not recited in the rejected claims. Although the claims are interpreted in light of the specification,

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limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993).

(B) Prior art of Hubbard fails to teach monitoring a target, as it instead teaches applying predefined workload units to a remote system.

As to point (B), Hubbard sends data workloads out to agents on client systems, which respond back with summaries of results (Hubbard, column 15, lines 27-60). The central server “monitors” the remote client software agent by waiting for the results and processing them when returned. The process is further outlined in Fig. 7b, where the central server compiles the received results in step 710. In response to the argument that Hubbard fails to teach a variety of notification and corrective options, these limitations are not supported by the rejected claims (see response to “(A)” above).

(C) The combination of Mercury and Hubbard is impermissible because there is no reason or suggestion to combine the two absent the use of hindsight.

As to point (C), a motivation to combine was given from the art in Sharon, column 2, lines 59-64, stating the combination would provide “traffic flow analysis through a network according to physical topology.” Both teachings are classified under Diagnostic Testing (subclass 241) under Multiplex Communications (class 370) and would not be unreasonable for a network engineer of ordinary skill in the art to combine in finding a network analysis solution.

***Claim Rejections - 35 USC § 103***

4. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

5. Claims 1, 4-6, 11-15, 19, 22-24, 29, 32, 33, 35, 37, and 38 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hubbard (US Patent 6,891,802) and Sharon et al. (US Patent 6,137,782).

6. As per claims 1 and 19, Hubbard teaches a method of performing distributed testing of a target (Hubbard, column 4, lines 15-31) comprising the steps of:

identifying a first and a second system which meets a predetermined criteria (Hubbard, column 15, line 60 to column 16, line 22, and figures 6A and 6B), said first system having a different owner than an owner of said target and an owner of said second system; (Hubbard, column 5, lines 53-57, and column 6, lines 9-19)

scheduling said first and second system to provide load to said target, said target comprising an object-oriented software component; and (Hubbard, column 15, line 27 to column 16, line 22, and figures 6A, 6B, and 5B)

deploying said first and said second system at the scheduled time, said first and said second system providing load to said target (Hubbard, column 15, lines 27-59 and figure 5B).

However, Hubbard fails to teach wherein the predetermined criteria include a physical location of said system.

Sharon teaches a method of testing and analyzing network traffic based on physical system location (Sharon, column 4, line 64 to column 5, line 33). It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to have combined Hubbard and Sharon to provide the physical location-based analysis of Sharon in the system of Hubbard, because doing so would enable traffic flow analysis through a network according to physical topology (Sharon, column 2, lines 59-64).

7. As per claims 4 and 22, Hubbard-Sharon teaches the system further wherein said predetermined criteria further include additional criteria selected from the group comprising: sizes of said systems, speeds of said systems (Hubbard, column 16, lines 24-34 and table 1), and availability of said systems (Hubbard, column 11, lines 16-26).

8. As per claims 5 and 23, Hubbard-Sharon teaches the system further wherein said first and said second system provides load across a network to said target (Hubbard, column 15, lines 27-59 and figure 5B).

9. As per claims 6 and 24, Hubbard-Sharon teaches the system further including the step of defining a catalog of potential systems which meet said predetermined criteria and wherein said step of identifying a first and second system is performed from

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said catalog of potential systems (Hubbard, column 15, line 60 to column 16, line 22, and figures 6A and 6B).

10. As per claims 11 and 29, Hubbard teaches a method of performing distributed monitoring of a target (Hubbard, column 4, lines 15-31) comprising the steps of:

identifying a first and a second system which meets a predetermined criteria (Hubbard, column 15, line 60 to column 16, line 22, and figures 6A and 6B), said first system having a different owner than said target and an owner of said second system; (Hubbard, column 5, lines 53-57, and column 6, lines 9-19)

scheduling said first and said second system to monitor said target; and (Hubbard, column 15, line 60 to column 16, line 22, and figures 6A and 6B)

deploying said first and said second system at the scheduled time, said first and said second system providing monitor functions to said target, said target comprising an object-oriented software component (Hubbard, column 15, line 27 to column 16, line 22, and figures 6A, 6B, and 5B).

However, Hubbard fails to teach wherein the predetermined criteria include a physical location of said system.

Sharon teaches a method of testing and analyzing network traffic based on physical system location (Sharon, column 4, line 64 to column 5, line 33). It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to have combined Hubbard and Sharon to provide the physical location-based analysis of

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Sharon in the system of Hubbard, because doing so would enable traffic flow analysis through a network according to physical topology (Sharon, column 2, lines 59-64).

11. As per claim 12, Hubbard-Sharon teaches the system further wherein said target comprises a web site (Hubbard, column 15, lines 27-59 and figure 5B).

12. As per claims 13 and 32, Hubbard-Sharon teaches the system further wherein said predetermined criteria further include additional criteria selected from the group comprising: sizes of at least one of said first and said second system, speeds of at least one of said first and said second system (Hubbard, column 16, lines 24-34 and table 1), and availability of at least one of said first and said second system (Hubbard, column 11, lines 16-26).

13. As per claim 14, Hubbard-Sharon teaches the system further wherein said first and said second system provides monitor functions across a network to said target (Hubbard, column 15, lines 27-59 and figure 5B).

14. As per claims 15 and 33, Hubbard-Sharon teaches the system further including the step of defining a catalog of potential system which meet said predetermined criteria and wherein said step of identifying a first and a second system is performed from said catalog of potential systems (Hubbard, column 15, line 60 to column 16, line 22, and figures 6A and 6B).



15. As per claim 35, Hubbard-Sharon teaches the system further wherein said systems provide load across a network to said target (Hubbard, column 15, lines 27-59 and figure 5B).

16. As per claims 37 and 38, Hubbard-Sharon teaches the system further wherein said providing load emulates a real world environment (Hubbard, column 18, lines 23-40).

17. Claims 7, 25, and 34 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hubbard (US Patent 6,891,802) and Sharon et al. (US Patent 6,137,782), further in view of Mercury (White Paper "Load Testing to Predict Web Performance").

18. As per claims 7 and 25, Hubbard-Sharon teaches the above, yet fails to teach wherein said software component is selected from the group consisting of EJB, Corba, COM, DCOM and COM+.

Mercury teaches the method wherein said software component is selected from the group consisting of EJB, Corba, COM, DCOM and COM+ (Mercury, pages 10-11, "Mercury LoadRunner" section). It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to have combined Hubbard-Sharon and Mercury to provide the software component selection of Mercury in the system of

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Hubbard-Sharon, because doing so would enable testing a larger variety of test targets and reuse of tests (Mercury, page 11, first paragraph).

19. As per claim 34, Hubbard-Sharon teaches the above, yet fails to teach wherein said software component is selected from the group consisting of EJB, CORBA, COM, DCOM, and COM+.

20. Mercury teaches the method wherein said software component is selected from the group consisting of EJB, Corba, COM, DCOM and COM+ (Mercury, pages 10-11, "Mercury LoadRunner" section). It would have been obvious to one of ordinary skill in the art, at the time the invention was made, to have combined Hubbard-Sharon and Mercury to provide the software component selection of Mercury in the system of Hubbard-Sharon, because doing so would enable testing a larger variety of test targets and reuse of tests (Mercury, page 11, first paragraph).

### ***Conclusion***

21. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any

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extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Nicholas Taylor whose telephone number is (571) 272-3889. The examiner can normally be reached on Monday-Friday, 8:00am to 5:30pm, with alternating Fridays off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Rupal Dharia can be reached on (571) 272-3880. The fax phone number for the organization where this application or proceeding is assigned is (703) 305-3718.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Nicholas Taylor  
Examiner  
Art Unit 2141

  
RUPAL DHARIA  
ADVISORY PATENT EXAMINER